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No. 98, Miscellaneous

In The

Supreme Court of the United States

October Term, 1957

KELSEY D. BARTLETT,
Petitioner,

vs.

ROBERT E. WEIMER, ET AL.,
Respondents.

BRIEF OF RESPONDENTS, MICHAEL AND WEIMER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the complaint of the petitioner state a claim against the respondents, Robert E. Weimer and I. E. Michael, upon which relief can be granted?

The District Court and the Court of Appeals said "no".

Respondents, Robert E. Weimer and I. E. Michael, maintain that the correct answer is "no".

SUPPLEMENTAL STATEMENT OF THE CASE

DEVELOPMENTS IN THE COURTS BELOW.

A. In the District Court.

The petitioner filed his complaint in the District Court against seven doctors and the Sheriff of Marion County, Ohio seeking damages in the sum of $2,500,000.00 and certain injunctive relief, entitling the complaint "Civil Action for Deprivation of Rights".

All of the respondents, including the respondents Weimer and Michael, filed motions to dismiss the complaint for its failure to state a claim upon which relief might be granted.

The District Court, the Honorable Frank L. Kloeb presiding, granted the motions and, with respect to the motion of the respondents, Weimer and Michael, entered an order on September 20, 1956 dismissing the complaint as to them. (Appendix A).

B. In the Court of Appeals.

The petitioner appealed the order of the District Court to the Court of Appeals for the Sixth Circuit and, on April 16, 1957, the Appellate Court unanimously affirmed the order of the District Court sustaining the motions of all the respondents to dismiss the complaint.

The order of the Court of Appeals for the Sixth Circuit is included herein as Appendix B.

C. The Complaint.

Petitioner alleges in his complaint that he was arrested and confined pursuant to an affidavit of mental illness filed by his wife and that on the following day he was com-

mitted to the Columbus State Receiving Hospital by the Probate Court pursuant to the provisions of Ohio Revised Code 5123.01 to 5123.62, inclusive. These are the Ohio statutes governing lunacy proceedings. He alleges further that he was determined to be mentally competent by the same Probate Court approximately one year following the original commitment.

In paragraph 8 of the complaint, petitioner specifies nine separate respects in which the lunacy proceedings were allegedly improper. Each of these specifications recites a complaint against the Probate Court of Marion County, Ohio, a party not designated as a defendant in the action.

The only reference in the complaint to the respondents, Robert E. Weimer and I. E. Michael, is found in paragraph 8 (5) on the second page of the complaint, as follows:

> "(5) Altho ORC 5123.23 requires only the examination by one physician in such instances, two signed the required medical certificate, but plaintiff was questioned by only one. The interview with the one physician, Dr. Robt. E. Weimer, apparently took place during the alleged hearing and when plaintiff became sarcastic and refused to answer questions concerning plaintiff's personal life and history the so-called physician became infuriated and departed. The required medical certificate was subsequently executed from this brief observation and from allegations concerning plaintiff made by others.

It is on the basis of these allegations alone that the petitioner claims to have stated a cause of action against the respondents, Weimer and Michael.

ARGUMENT

Does the complaint of the petitioner state a claim against the respondents, Robert E. Weimer and I. E. Michael, upon which relief can be granted?

The District Court and the Court of Appeals said "no". Respondents, Robert E. Weimer and I. E. Michael, maintain that the correct answer is "no".

A. There is No Federal Question Involved.

It is apparent upon the face of the complaint that the only basis upon which federal jurisdiction might be sustained is that a federal question is involved. It is submitted, however, that no federal question is stated in petitioner's complaint.

New Orleans v. *Benjamin* (1894) 153 U.S. 411, 424.

Whittington v. *Johnston, et al.*, (D.C. Ala 1952) 102 F.Supp. 352; aff'd. 201 F. Reporter 2d. 810; cert. denied 346 U.S. 867.

Kenney, Jr. v. *Fox* (3 cases) 6th Cir. (1952) 232 F. Reporter 2d. 288.

Martens v. *Holbrook, et al.*, (C.C.N.D. Cal. 1907) 157 Fed. 716.

The allegations of the complaint do not state a controversy under the Constitution of the United States and there is no complaint made that the cause of action sought to be stated arises under any law of the United States. In commenting upon the constitutional test, Mr. Chief Justice Fuller stated in his opinion in the *New Orleans* case, supra, at page 424 as follows:

> "1. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determin-

> ation of which the result depends, then it is not a suit arising under the Constitution."

In the case of *Marten* v. *Holbrook*, supra, the complaint alleged, in substance, that the several defendants entered into a conspiracy by unlawful means to deprive the plaintiff of his liberty and property and that they unlawfully, forcibly and without due process of law caused his arrest and confinement in a state asylum. The defendants apparently demurred to the amended complaint and one of the grounds of the demurrer challenged the jurisdiction of the district court. In sustaining the demurrer on the jurisdictional ground, Judge Van Fleet stated in his opinion at page 717 as follows:

> "The only ground of the demurrer interposed to the amended complaint which I deem it necessary or material to notice is that challenging the jurisdiction of this court. The pleading presents an evident attempt to state a cause of action under the provisions of the fourteenth amendment to the Constitution of the United States and the statutes enacted in pursuance thereof for a deprivation of civil rights, such as to bring it within the jurisdiction of the Circuit Court; but stripped of matter and a wealth of adjectives that add nothing of substance, the complaint states no more to the mind than a cause of action for false imprisonment; a wrong which it is the province of the state, and not the federal, courts to redress."

The instant case is likewise an attempt by Mr. Bartlett to state a cause of action under the provisions of the Constitution of the United States and the statutes enacted in pursuance thereof for a deprivation of civil rights. However, a close examination of the complaint discloses that, if it states a cause of action in any respect (which respondents deny), it is merely one for false arrest or false im-

prisonment or malicious prosecution, or one of a myriad of other simple torts redressable in the state court.

In his complaint, petitioner alleges at page 4, paragraph 12 thereof as follows:

> "Because of such willful and intentional disregard of plaintiff's constitutional rights, plaintiff has been subject to false arrest and imprisonment, malicious prosecution, malpractice, libel, slander, assault and battery."

Such unlawful and unwarranted restraint of petitioner's person, if that it be, does not invoke the provisions of the constitution and laws of the United States. This distinction is noted by Judge Van Fleet in his opinion in the *Marten* case, supra, at page 717 as follows:

> "The provisions of the Constitution and laws of the United States, the protection of which it is sought here to invoke, do not relate to or include such merely private wrongs or transgressions as those complained of. The inhibitions of those enactments are against the state, its officers or agents, and not against the acts of merely private individuals acting as such. The invasion of the individual rights of one citizen by the unofficial and unsanctioned acts of another individual is left to the redress of the state or local tribunals whose jurisdiction is in no way intended to be affected by those provisions."

In sustaining the several motions of the respondents to dismiss the complaint, the District Court and the Court of Appeals relied upon the same authorities in reaching their respective decisions and it is submitted that these authorities are fully determinative of the issues raised by the motions. They are as follows:

Whittington v. *Johnston, et al.*, (D.C. Ala. 1952, 102 F. Supp. 352; aff'd. 201 F. Reporter 2d. 810, cert. denied 346 U.S. 867.

Kenney, Jr. v. *Fox* (3 cases) 6th Cir. (1952) 232 F. Reporter 2d, 288.

Marten v. *Holbrook, et al.*, (C.C.N.D., Cal., 1907) 157 Fed. 716.

The case of *Whittington* v. *Johnston* was an action by the plaintiff against a Dr. Johnston and others under the civil rights statutes. Motions by the defendants to dismiss were granted by the district court. The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court and certiorari was denied in this Court. The complaint alleged, in substance, that the plaintiff was committed to an insane hospital on the false and unwarranted certificates of the defendants. None of the defendants was alleged to have been an officer of the State of Alabama, nor to have acted in any official capacity at the time they were alleged to have conspired together to deprive the plaintiff of her liberty.

The report of the case in the Fifth Circuit (201 F.2d, 810) discloses that the defendant, Dr. Johnston, executed the medical certificate that the plaintiff was insane and that the plaintiff was thereafter committed to an insane hospital by the Alabama Probate Court upon the basis of Dr. Johnston's medical certificate.

Judge Kennamer of the District Court stated at page 353 of his opinion as follows:

> "(5) This court is of the opinion that there are no provisions in the federal constitution establishing a right in favor of persons not to be deprived of liberty on false or malicious testimony in state courts by private individuals, where procedural due process has been conformed with, and where the alleged misconduct on the part of the private individual is punishable under the laws of the state, and are also civilly actionable.
>
> "The right alleged to have been violated is not a right secured by the United States Constitution and the Amendments thereto.

"(6) The right not to have private individuals swear falsely in a state court is not a right secured or recognized by the Constitution, and congress has not, and cannot, create a federal cause of action in favor of persons injured by private individuals through the abridgment of rights which are not federal constitutional right."

In the instant case, Petitioner alleges in the complaint that he was deemed to be mentally ill by the Probate Court of Marion County, Ohio. The only reference in the complaint to Dr. Weimer is found on page 2, paragraph 8, subparagraph 5 as follows:

"(5) Altho ORC 5123.23 requires only the examination by one physician in such instances, two signed the required medical certificate, but plaintiff was questioned by only one. The interview with the one physician, Dr. Robt. E. Weimer, apparently took place during the alleged hearing and when plaintiff became sarcastic and refused to answer questions concerning plaintiff's personal life and history the so-called physician became infuriated and departed. The required medical certificate was subsequently executed from this brief observation and from allegations concerning plaintiff made by others."

There is no reference anywhere in the complaint to Dr. I. E. Michael and there is no allegation in the complaint that either Dr. Weimer or Dr. Michael is, or ever was, an officer of the State of Ohio or that either of them acted in the Bartlett case in any official capacity. On the contrary, the Ohio Probate Statutes controlling lunacy proceedings describe such doctors as "witnesses". (Appendix C).

As a matter of fact, the nine specifications of misconduct, set forth under paragraph 8 on page 2 of the complaint, refer to alleged misconduct on the part of the Probate Judge of Marion County, Ohio who is not even a party to this action. Nowhere in the complaint is it alleged that either Dr. Weimer or Dr. Michael acted other than as

mere private individuals. Nowhere in the complaint is it alleged that either Dr. Weimer or Dr. Michael were officers of the State of Ohio. Nowhere in the complaint is it alleged that either Dr. Weimer or Dr. Michael executed the medical certificate required by the Probate Court. It is alleged merely that Dr. Weimer interviewed Bartlett and that the medical certificate required by Section 5123.23 of the Ohio Revised Code (Appendix C) was subsequently executed and, from these general allegations, petitioner seeks to conclude that the certificate was executed by Dr. Weimer.

This may be the fact, but it does not so appear in the allegations of the complaint. And assuming it is the fact, it has no material bearing on the merits of the motion to dismiss. If, in fact, Dr. Weimer did examine Bartlett and prepare a report, he did so upon the order of the Probate Court and exercised no personal discretion in the matter.

But the real significance of the *Whittington* v. *Johnston* case, supra, is found in the distinction which the Fifth Circuit notes between the action of a State Probate Court and the action of the doctor and other defendants under the state lunacy statutes. Judge Strum states this distinction at page 811 of the opinion (201 F.2d) as follows:

> "It is a *non sequitur* to say that merely by instituting the lunacy proceeding, the defendants 'caused' plaintiff to be deprived of her right to due process within the meaning of 8 U.S.C.A. Sec. 43. If there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants. Whether or not notice should be given is committed by the Alabama statute to the discretion of the probate judge. These defendants had no duty in that behalf. They simply instituted the lunacy proceeding as the Alabama statute authorized them to do, and left the conduct thereof wholly to the discretion of the probate judge whose duty and function it was to give any necessary notice.

B. There is No Constitutional Question Involved.

The petitioner seeks to inject a question concerning the constitutionality of the Ohio Probate statutes governing lunacy proceedings, but it is submitted that there is no constitutional issue in the case.

Insofar as the allegations of the complaint are concerned, there is no claim made that either Dr. Weimer or Dr. Michael acted other than in pursuance of the Ohio Probate statutes. As a matter of fact, as pointed out previously in this brief, there is no allegation that either Dr. Weimer or Dr. Michael acted in any capacity with reference to Bartlett's commitment. But again assuming, arguendo, that these doctors interviewed Bartlett and/or signed the medical certificate attesting Bartlett's mental illness, they could not become liable in this action even though it should be determined that the Probate statutes are unconstitutional. Thus, the constitutional issue is immaterial.

Whittington v. *Johnston, et al.*, (D.C. Ala. 1952) 102 F. Supp. 352; aff'd. 201 F. Reporter 2d, 810; cert. denied 346 U.S. 867.

Again in the *Whittington* v. *Johnston* case, supra, this issue was before the Fifth Circuit. In that case, the defendants invoked the Alabama statutes pertaining to insanity proceedings. As of the time of the institution of those proceedings, the Alabama statutes had not been declared invalid or unconstitutional. In determining that the defendants had the right to act upon the presumption that the statutes were valid, the court stated at page 811 of its opinion as follows:

> "In invoking the Alabama statutes, defendants were entitled to act upon the presumption that the statute is valid, as it has not been authoritatively declared otherwise, and that in administering it the probate judge would proceed in accordance with the essential re-

quirements of law. The mere institution of the lunacy proceeding, without more, is too remote in the chain of causation to support an action under 8 U.S.C.A. Sec. 43 for 'causing' plaintiff to be deprived of the right to due process.

"If plaintiff's contentions are correct, then one who invokes the jurisdiction of a state court in a lunacy proceeding acts at his peril, and becomes liable under 8 U.S.C.A. Sec. 43 in the event it turns out that the statute under which th court acts, or the procedure followed by the state officers in administering it, do not satisfy the requirements of due process. To hold the defendants liable in such circumstances would impose upon them a vicarious liability not contemplated by 8 U.S.C.A. Sec. 43. That statute does not require those who regularly institute a lunacy proceeding under a state statute to stand sponsor for the validity of the statute, nor for the acts of the state officers in administering it."

In the instant case, petitioner claims that his commitment by the Probate Court was void and illegal because of failure of due process and lack of jurisdiction. (Petition, 2) Certainly these are not matters with which the respondents, Weimer and Michael, need concern themselves. If they acted in any respect in this case, they were entitled to assume that the Probate Judge would proceeed in accordance with the essential requirements of the law.

They cannot be required to stand sponsor for the validity of the statutes, nor for the acts of the state officers in administering them. It makes no difference that the complaint contains allegations that the defendants acted willfully and maliciously in instituting the proceedings against Bartlett. Again in the *Whittington* v. *Johnston* case, supra, the court disposed of this contention at page 812 of the opinion as follows:

"Plaintiff alleges that in instituting the lunacy inquisition, the defendants acted willfully and malicious-

ly. But this adds no strength to the complaint under 8 U.S.C.A. Sec. 43. Neither the Fourteenth Amendment nor the Civil Rights Acts purport to secure a person against unfounded or malicious lunacy proceedings. If the facts here involved make out a case of false arrest or malicious prosection, the redress of such wrongs is left with the states."

CONCLUSIONS

It is submitted that the courts below were correct in sustaining the motion of the respondents, Robert E. Weimer and I. E. Michael, to dismiss petitioner's complaint. If the petitioner has any cause of action against these respondents, which respondents vigorously deny, then it is a cause of action sounding in simple tort which is redressable in the state and not the federal courts.

The District Court and the Court of Appeals considered and decided the only issue presented. In deciding this issue, they followed the decisions of this Court and of the Courts of Appeals which had previously considered the question. Therefore, no grounds exist calling for the exercise of this Court's power of supervision, or requiring this Court to assume jurisdiction of the case.

The petition for certiorari should be denied.

Respectfully Submitted:

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APPENDIX A

In conformity with Rule 77(d) F. R. C. P., please take notice that the following order of judgment was entered in this Court on 9/20/56.

C. B. Watkins, Clerk

No. 7547 Civil

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

KELSEY D. BARTLETT,

Plaintiff,

vs.

DR. ROBERT E. WEIMER, ET AL.,

Defendants.

This day this cause was submitted to the Court upon the motion of the defendants, Robert E. Weimer and I. E. Michael, for an order quashing the service of process upon them and the returns made pursuant thereto, and dismissing the action as to them, and upon consideration thereof, the Court sustains such motion.

IT IS, THEREFORE, ORDERED that the service of process upon the defendants, Robert E. Weimer and I. E. Michael, and the returns made pursuant thereto, be quashed, and

IT IS FURTHER ORDERED that such action be and it hereby is dismissed as to defendants, Robert E. Weimer and I. E. Michael, at plaintiff's costs.

FRANK L. KLOEB
United States District Judge.

See 157 Fed. Rep. 716.
102 Fed. Supp. 352.
201 Fed. Rep. 2nd, 810.
232 Fed. Rep. 2nd, 288.
Toledo, Ohio.

APPENDIX B

No. 13,063

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Filed, April 16, 1957

CARL W. REUSS, Clerk

KELSEY D. BARTLETT,
Appellant,

vs.

DR. ROBERT E. WEIMER, ET AL.,
Appellees.

ORDER

Before SIMONS, Chief Judge; McALLISTER and STEWART, Circuit Judges.

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of coun-

sel for appellees, and Kelsey D. Bartlett, appellant in propria persona, and the court being duly advised,

Now therefore, It is ORDERED, ADJUDGED and DECREED that the order of the district court sustaining a motion for an order quashing service of process upon appellees and dismissing the action as to them, be affirmed upon the authority of *Marten* v. *Holbrook, et al.*, 157 Fed. 716 (C.C. N.D., Cal.); *Whittington* v. *Johnston, et al.*, 102 F. Supp. 352, aff. 201 F. 2d 810; and *Kenney* v. *Fox*, 232 F. 2d 288 (C.A. 6), relied upon by Judge Kloeb in his order sustaining appellees' motion.

Approved for entry:

/s/ THOMAS F. McALLISTER
United States Circuit Judge

APPENDIX C

OHIO REVISED CODE SECTION 5123.23

§ 5123.23 Hearing; commitment or discharge, (GC § 1890-27)

On the day set for hearing the probate judge shall, without the intervention of a jury, proceed to examine the witness in attendance, and further witnesses that such judge desires to call. He shall cause an examination of such person to be made by at least one physician and a report of such examination to be made a part of the court record. Upon the hearing of the testimony, which hearing may be had at any place within the county, as the probate judge designates, and after receiving the report of the physician, if such judge is satisfied that the person charged is mentally ill and in need of specialized care and treatment, he may by order duly entered proceed as follows:

(A) Commit such person to the proper receiving hospital or state hospital for the mentally ill for treatment.

(B) Commit such person to the department of public welfare and deliver him to the facility provided by the department for persons described in section 5125.04 of the Revised Code;

(C) Commit such person to the veterans administration or other agency of the United States government, as provided by section 5905.02 of the Revised Code;

(D) Order that such person be placed in a private hospital, home, or institution, licensed and approved by the division of mental hygiene, at the expense of such person or at county expense, until further order of the probate judge;

(E) Remand such person to the custody of a relative, friend, or other suitable person until further order of the probate judge;

(F) Order such person placed in the county home or other place provided by the board of county commissioners until further order of the probate judge;

If the court finds such person not to be mentally ill and not in need of specialized care and treatment it shall order his discharge forthwith.

No such person 70 years of age or over shall be committed under division (A) and no such person shall be committed under division (C), placed under divisions (D) or (F), or remanded under division (E) until after consent to accept such person is received from the designated institution, hospital, clinic, or suitable person.

The medical witnesses provided by this section and section 5123.24 of the Revised Code must be registered physicians in Ohio and must have had at least three years' experience in the practice of medicine.

Effective Oct. 2, 1953. 125 v H 142.

[This section is also amended in 125 v S 155, however, this amendment does not become effective until July 1, 1954. For the text of this section prior to either amendment see the note following amendment 125 v S 155 below.]

Unless for good cause the hearing is adjourned, the probate judge, on the next business day after the return of the service of the warrant of detention, shall, without the intervention of a jury, proceed to examine the witness in attendance, and further witnesses that such judge desires to call. He shall cause an examination of such person to be made by at least one physician and a report of such examination to be made a part of the court record. Upon the hearing of the testimony, which hearing may be had at any place within the county, as the probate judge designates, and after receiving the report of the physician, if such judge is satisfied that the person charged is mentally ill and in need of specialized care and treatment, he may by order duly entered proceed as follows:

(A) Order that such person be placed in a receiving hospital for observation or treatment, or both;

(B) Commit such person to the proper state hospital for the mentally ill for treatment;

(C) Commit such person to the department of mental hygiene and correction and deliver him to the facility provided by the department for persons described in section 5125.04 of the Revised Code;

(D) Commit such person to the veterans administration or other agency of the United States government, as provided by section 5905.02 of the Revised Code, after having received the written consent of such hospital to receive such person;

(E) Order that such person be placed in a private hospital, home, or institution, licensed and approved by the division of mental hygiene, at the expense of such person or at county expense;

(F) Remand such person to the custody of a relative, friend, or other suitable person;

(G) Commit such person to the county home or other place provided by the board of county commissioners;

(H) Discharge such person.

The medical witnesses provided by this section and section 5123.24 of the Revised Code must be registered physicians in Ohio and must have had at least three years' experience in the practice of medicine.

Effective July 1, 1954. 125 v S 155.

This section, prior to either of the above amendments, was identical to the above except that in subdivision (C), line 2, it read "department of public welfare" instead of "department of mental hygiene and correction". It is in effect only during the one day of October 1, 1953, when it is superseded by amendment 125 v H 142.